

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KELLEY-ROSS & ASSOCIATES,
INC.,

Plaintiff,

v.

EXPRESS SCRIPTS, INC.,

Defendant.

C22-148 TSZ

ORDER

THIS MATTER comes before the Court on a Motion to Dismiss, docket no. 17, filed by Defendant Express Scripts, Inc. (“Express Scripts”). Having reviewed all papers filed in support of, and in opposition to, the motion, the Court enters the following Order.

Background

Plaintiff Kelley-Ross & Associates, Inc. (“Kelley-Ross”) is a pharmacy group operating a Long-Term Care (“LTC”) Pharmacy and a Retail Pharmacy at the Polyclinic Madison Center in Seattle, Washington. Compl. at ¶ 6 (docket no. 1-1). The Retail Pharmacy “is the primary pharmacy provider for a large population of vulnerable patients in Seattle’s urban core.” *Id.* at ¶ 8. One service the Retail Pharmacy offers is the “One-

1 Step PrEP”¹ Program, which uses a brand-name drug called Truvada to help people at
2 risk of exposure to the Human Immunodeficiency Virus (“HIV”) avoid contracting the
3 virus. Id. There is also a “generic” version of Truvada known as Emtricitabine-
4 Tenofovir Disoproxil Fumarate (“ETDF”). Id.

5 Express Scripts is a Pharmacy Benefit Manager (“PBM”), which serves as an
6 intermediary between a plan sponsor, or what one would commonly think of as an
7 insurance company, and a pharmacy. Id. at ¶ 11. Express Scripts serves this
8 intermediary role by processing claims for the insurance coverage of prescription benefits
9 for many plan sponsors. Id. To accomplish this, Express Scripts contracts with
10 pharmacies so that they may provide services to a patient whose pharmacy benefits are
11 administered by Express Scripts. Id. at ¶ 13.

12 The term “Specialty Drugs” is used to describe drugs that require more
13 comprehensive care and support for patients. Id. at ¶ 15. Both Truvada and ETDF are
14 considered Specialty Drugs. Id. Kelley-Ross asserts that the higher complexity of the
15 therapies associated with Specialty Drugs “often leads PBMs, like [Express Scripts], to
16 require higher standards for pharmacies that dispense Specialty Drugs, including special
17 credentialing, inspections, and the implementation of stringent and costly medication-
18 handling and patient-monitoring practices designed to protect patients undergoing
19 specialty therapies.” Id. at ¶ 17.

22 ¹ “PrEP” stands for “pre-exposure prophylaxis.” Compl. at ¶ 8.

1 Kelley-Ross contends that in December 2016, Express Scripts notified it that to
2 “dispense specialty therapies,” both its LTC and Retail Pharmacies would need to
3 undergo additional “Specialty Provider” credentialing and agree to new contractual terms
4 and conditions. Id. at ¶¶ 18 & 21. According to Kelley-Ross, Express Scripts refused to
5 inform it of the reimbursement rates under the new contract until after it went through the
6 Specialty Provider accreditation process. Id. at ¶ 19. It took Kelley-Ross years to
7 complete the Specialty Provider accreditation process for both its pharmacies. Id. at ¶ 21.

8 Eventually, Kelley-Ross entered into Provider Agreements with Express Scripts
9 for both the LTC and Retail Pharmacies. Compl. at ¶ 26. The Provider Agreements
10 included a “Specialty Amendment to the Express Scripts, Inc. Pharmacy Provider
11 Agreement,” a “Specialty Addendum,” and an “Attachment 1, Covered Specialty
12 Medications” (“Specialty Attachment”).² Id. at ¶ 27.

13 Section 3.1.a of the Provider Agreement states that “[f]or services performed in
14 accordance with the terms and conditions of this Agreement, [Express Scripts] shall pay
15 Provider the agreed upon rates, as set forth in the applicable rate exhibit.” Provider
16 Agreement, Ex. B to Stacy Decl. (docket no. 12-1 at 32).³ The rate exhibit is titled
17 “Exhibit A – ES1000” (“ES1000”) and defines “Covered Specialty Medications” as
18 “those Covered Medications that are (i) set forth in the Schedule S Retail Specialty Drug
19

20 ² Kelley-Ross refers to all three documents collectively as “Schedule S.” Compl. at ¶ 28.

21 ³ Although Kelley-Ross did not attach the relevant contractual documents to its complaint, Express
22 Scripts attached them to its motion to dismiss. The complaint, however, does reference the contractual
23 documents throughout and neither party has argued that the Court should not consider these exhibits when
addressing the pending motion.

Program, as further described in [the Specialty Attachment], attached hereto and incorporated herein by this reference; and (ii) covered by Sponsor.” ES1000, Ex. E to Stacy Decl. (docket no. 12-1 at 92). Section 2.1(b) of the ES1000 explains how the reimbursements will be calculated for Specialty Medications:

2. Provider Reimbursement for Covered Medications.

2.1 For Covered Medications dispensed to Members under this [ES1000], Provider shall receive reimbursement equal to the lowest of the following . . . :

. . .

(b) the applicable AWP^[4] discount plus applicable dispensing fee as set forth in Section 2.4 (or per the applicable Supplemental Schedule).

ES1000 (docket no. 12-1 at 92).

If Express Scripts is making the reimbursement under section 2.1(b), then section 2.4 contains the various contract rate tables dictating the reimbursement amount. ES1000 (docket no. 12-1 at 93–96). For specialty medications, however, section 2.4.f directs the parties to the Specialty Attachment:

2.4.f Schedule S Retail Specialty Drug Program: applicable to those Covered Specialty Medications dispensed by Provider to Members of a Sponsor utilizing a Retail Specialty Drug Program option where Provider has been designated as a “Participating Provider” by such Sponsor, as further described in [the Specialty Attachment].

ES1000 (docket no. 12-1 at 96). The Specialty Attachment provides the reimbursement rates for Covered Specialty Medications as follows:

⁴ Neither the parties nor the contract define the term “AWP.”

	BRANDS	GENERICS - A	GENERICS - B
Year 1			
Year 2			
Year 3			

COVERED SPECIALTY MEDICATIONS				
AFINITOR	GLEEVEC	NEUPOGEN	SEROSTIM	TECFIDERA
ATRIPLA	GONAL-F RFF REDI-JECT	NORVIR	SIMPONI	TIVICAY
CELLCEPT	HARVONI	ORENCIA	SOVALDI	TRIUMEQ
CIMZIA	HUMIRA	OTEZLA	SPRYCEL	TRUVADA
COMPLERA	IBRANCE	POMALYST	STELARA	VIEKIRA PAK
COPAXONE	INTELENCE	PREZISTA	STRIBILD	VIREAD
ENBREL	ISENTRESS	PROGRAF	SUSTIVA	XELJANZ
EPZICOM	KALETRA	PULMOZYME	SUTENT	XIAFLEX
FOLLISTIM AQ	MENOPUR	REVLIMID	TARCEVA	XTANDI
FORTEO	NEULASTA	REYATAZ	TASIGNA	ZYTIGA

Specialty Attachment, Ex. E to Stacy Decl. (docket no. 12-1 at 100).⁵ “Where, ‘Brands’ are drugs sold under a brand-name label, ‘Generic – A’ is the same drug sold under a generic name, but produced exclusively by one manufacturer.” Compl. at ¶ 29. A “Generic – B” drug is a generic drug that can be produced by any manufacturer. *Id.* Although the Specialty Attachment provided how reimbursements would be calculated for both Generic – A and Generic – B drugs, the Covered Specialty Medications table listed *only* the names of brand-name drugs. *Id.* at ¶ 30.

⁵ Pursuant to the Motion to Seal filed by Express Scripts, docket no. 14, the Court has redacted the pricing terms from the contract provision, which are not necessary for resolving the motion to dismiss.

1 If a specialty medication is not listed in the Covered Specialty Medications table,
2 section 1.3 of the Specialty Attachment explains how the medication will be reimbursed:

3 **1.3 For All Other Covered Medications that are Not a Covered**
4 **Specialty Medication.** Participating Provider shall be reimbursed in
5 accordance with the 30 Day and 90 Day (if applicable) rates then in effect
6 for the applicable network configuration utilized by the Sponsor in which
7 Provider participates pursuant to this [ES1000].

8 Specialty Attachment (docket no. 12-1 at 100).

9 When the parties signed the agreements at issue, only the brand-name drug
10 Truvada, and not any generic version, was available. Compl. at ¶ 31. On October 1,
11 2020, the generic drug for Truvada, ETDF, became available. Id. at ¶ 32. When ETDF
12 became available, Kelley-Ross believed that it would be reimbursed for the drug under
13 the calculations provided in the Specialty Attachment for Generic – A drugs. Id. at ¶ 31.
14 Instead, Express Scripts reimbursed Kelley-Ross under the lower rates provided for non-
15 Specialty drugs in the ES1000. Id. at ¶ 31. Kelley-Ross alleges that the amount Express
16 Scripts actually reimbursed it for ETDF was below the amount Kelley-Ross itself was
17 paying to obtain the medication. Id. at ¶ 32. Furthermore, Kelley-Ross was “also
18 incurring significant additional costs to ensure compliance with all the requirements set
19 forth in the Specialty Addendum (such as patient outreach and monitoring).” Id.
20 According to Kelley-Ross, it was losing over \$400 per ETDF prescription it filled. Id.

21 After the parties failed to come to an understanding about how ETDF prescriptions
22 are reimbursed under their contract, Kelley-Ross filed a complaint alleging breach of
23 contract, breach of the covenant of good faith and fair dealing, and violation of the

1 Washington Consumer Protection Act (“CPA”). Id. at ¶¶ 39–53. Express Scripts now
2 moves to dismiss for failure to state a claim.

3 Discussion

4 **I. Legal Standard**

5 Although a complaint challenged by a Rule 12(b)(6) motion to dismiss need not
6 provide detailed factual allegations, it must offer “more than labels and conclusions” and
7 contain more than a “formulaic recitation of the elements of a cause of action.” Bell Atl.
8 Corp. v. Twombly, 550 U.S. 544, 555 (2007). The complaint must indicate more than
9 mere speculation of a right to relief. Id. When a complaint fails to adequately state a
10 claim, such deficiency should be “exposed at the point of minimum expenditure of time
11 and money by the parties and the court.” Id. at 558. A complaint may be lacking for one
12 of two reasons: (i) absence of a cognizable legal theory, or (ii) insufficient facts under a
13 cognizable legal claim. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th
14 Cir. 1984). In ruling on a motion to dismiss, the Court must assume the truth of the
15 plaintiff’s allegations and draw all reasonable inferences in the plaintiff’s favor. Usher v.
16 City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). The question for the Court is
17 whether the facts in the complaint sufficiently state a “plausible” ground for relief.
18 Twombly, 550 U.S. at 570. If the Court considers matters outside the complaint, it must
19 convert the motion into one for summary judgment. Fed. R. Civ. P. 12(d). If the Court
20 dismisses the complaint or portions thereof, it must consider whether to grant leave to
21 amend. Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000).

II. Breach of Contract

Express Scripts moves to dismiss Kelley-Ross's first claim for breach of contract. To state a claim for breach of contract, a plaintiff must allege (1) a duty imposed by the contract that (2) was breached, with (3) damages proximately caused by the breach. C 1031 Props., Inc. v. First Am. Title Ins. Co., 175 Wn. App. 27, 33, 301 P.3d 500 (2013). Express Scripts argues that Kelley-Ross has failed to state a claim for breach of contract because Kelley-Ross "is misreading the contract." Mot. to Dismiss at 5 (docket no. 17).

The parties essentially dispute whether ETDF qualifies as a Covered Specialty Medication. Under Kelley-Ross's interpretation, ETDF constitutes a Covered Specialty Medication because the brand-name medication, Truvada, is listed on the Covered Specialty Medications table. Kelley-Ross alleges that although the Covered Specialty Medications table listed only brand-name drugs, the listing of the brand-name was intended to include both the brand-name and generic versions of the listed brand-name drug. Kelley-Ross contends that this is why the table in section 1.2 of the Specialty Attachment includes the reimbursement rates for Generic – A and Generic – B drugs, even though the Covered Specialty Medications table listed only brand-name drugs.

On this motion to dismiss, the Court must draw all reasonable inferences in favor of Kelley-Ross. Considering that one of the tables in section 1.2 of the Specialty Attachment listed reimbursement rates for Generic –A and Generic – B drugs even though the Covered Specialty Medications table listed only brand-name drugs, the Court determines that, when drawing all reasonable inferences in Kelley-Ross's favor, Kelley-

Ross has alleged a plausible interpretation of the contract. Although Express Scripts provides a different explanation for why the table includes the reimbursement rates for Generic – A and Generic – B drugs, this does not render Kelley-Ross’s interpretation of the contract less plausible. Additionally, Kelley-Ross’s interpretation of the contract does not “nullify and render meaningless the requirement in the ‘Covered Specialty Medications’ definition that the medications at issue be ‘set forth’ in Schedule S as described in [the Specialty Attachment].” Mot. to Dismiss at 10 (docket no. 17). Instead, under Kelley-Ross’s interpretation, the generic medications are set forth in the Specialty Attachment via the naming of the corresponding brand-name medication.

Thus, Kelley-Ross alleges that although the contract required Express Scripts to reimburse it for ETDF according to the reimbursement rates provided in the Specialty Attachment, Express Scripts reimbursed it at the rate applicable to non-specialty drugs. See Compl. at ¶¶ 31 & 42. Kelley-Ross asserts that Express Scripts’s failure to reimburse it at the correct rate caused it to suffer damages. See id. at ¶ 44. The Court determines Kelley-Ross has adequately stated a claim for breach of contract. The motion to dismiss, docket no. 17, as it relates to Count I for breach of contract, is DENIED.

III. Breach of the Covenant of Good Faith and Fair Dealing

Express Scripts also moves to dismiss Kelley-Ross’s second claim for breach of the covenant of good faith and fair dealing. Under Washington law, “[t]here is in every contract an implied duty of good faith and fair dealing” that “obligates the parties to cooperate with each other so that each may obtain the full benefit of performance.”

Badgett v. Sec. State Bank, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). “[T]he duty of

1 good faith and fair dealing arises when one party has discretionary authority to determine
2 a future contract term.” Rekhter v. State, Dep’t of Soc. & Health Servs., 180 Wn.2d 102,
3 112, 323 P.3d 1036 (2014).

4 The Specialty Attachment provides that “the list of Covered Specialty
5 Medications, including dosage and route forms, may be changed by [Express Scripts] at
6 its sole discretion,” that “such change shall not require the consent of, or notice to,
7 [Kelley-Ross],” and that “such change(s) shall automatically become incorporated into
8 this [ES1000], without the necessity of a formal amendment or writing.” Specialty
9 Attachment (docket no. 12-1 at 100–01); Compl. at ¶ 25. Kelley-Ross alleges that
10 Express Scripts had a duty to act in good faith regarding this provision of the Specialty
11 Attachment and that Express Scripts “breached its duty by refusing to reimburse Plaintiff
12 for the Generic – A rate for generic-labeled ETDF, interpreting the parties’ contract in
13 such a way to deny [Kelley-Ross] of the benefit of its bargain.” Compl. at ¶ 47.

14 Express Scripts argues that the claim for breach of the covenant of good faith and
15 fair dealing fails to state a claim for the same reason as the breach of contract claim. The
16 Court, however, has rejected Express Scripts’s argument that Kelley-Ross failed to state a
17 claim for breach of contract. Alternatively, Express Scripts contends that this claim fails
18 because Kelley-Ross “has no allegations that Count II involved some sort of
19 ‘discretionary authority.’” Mot. to Dismiss at 13. The complaint, however, clearly
20 alleges that Express Scripts breached its duty of good faith when exercising the
21 discretionary authority afforded it by the Specialty Attachment. Compl. at ¶¶ 46–47.

1 Nevertheless, the Court concludes that Kelley-Ross has failed to state a claim for
2 breach of the covenant of good faith and fair dealing. In its Response, docket no. 18,
3 Kelley-Ross asserts that its claim for breach of the covenant of good faith and fair dealing
4 is based on an alternative argument where, “should ETDF not be deemed to be the
5 Generic – A of Truvada for purposes of the Specialty Addendum, then [Express Scripts]
6 who retained and exercised the discretion to change the list of Covered Specialty
7 Medications, failed to do so in a manner that breached its covenant of good faith and fair
8 dealing.” Resp. at 17. While the Court recognizes this might be sufficient to allege a
9 claim for breach of the covenant of good faith and fair dealing, this is not what Kelley-
10 Ross alleged in its complaint. Instead, Kelley-Ross merely alleged that Express Scripts
11 breached its duty by “interpreting the parties’ contract in such a way to deny [Kelley-
12 Ross] of the benefit of its bargain.” Compl. at ¶ 47. Because how a party interprets a
13 contract does not relate to an authority to determine a future contract term, the complaint,
14 as currently written, fails to state a claim for breach of the covenant of good faith and fair
15 dealing. For this reason, the Court DISMISSES the second claim without prejudice and
16 with leave to amend.

17 **IV. Violation of the Consumer Protection Act**

18 Lastly, Express Scripts moves to dismiss Kelley-Ross’s third cause of action
19 alleging a CPA violation. The CPA makes unlawful “[u]nfair methods of competition
20 and unfair or deceptive acts or practices in the conduct of any trade or commerce.”
21 RCW 19.86.020. “To prevail in a private CPA claim, the plaintiff must prove (1) an
22 unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the
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1 public interest, (4) injury to a person’s business or property, and (5) causation.” Panag v.
2 Farmers Ins. Co. of Wash., 166 Wn.2d 27, 37, 204 P.3d 885 (2009) (citing Hangman
3 Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 784, 719 P.2d 531
4 (1986)). Express Scripts argues that Kelley-Ross has failed to adequately plead the first
5 and third elements.

6 **a. Unfair or Deceptive Act or Practice**

7 As to the first element, whether a certain act or practice is “unfair or deceptive” is
8 a question of law. Panag, 166 Wn.2d at 47. The Washington Supreme Court has held
9 that “a claim under the Washington CPA may be predicated upon a per se violation of
10 statute, an act or practice that has the capacity to deceive substantial portions of the
11 public, or an unfair or deceptive act or practice not regulated by statute but in violation of
12 public interest.” Klem v. Wash. Mut. Bank, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013).
13 A plaintiff need only show that the act in question had the capacity to deceive a
14 substantial portion of the public, not that it was intended to deceive. Panag, 166 Wn.2d
15 at 47.

16 In its complaint, Kelley-Ross alleges that Express Scripts acted unfairly because
17 its practice of refusing to reimburse pharmacies at the contracted rate for generic
18 specialty medications deprives pharmacies of the ability to dispense those medications
19 without suffering substantial harm. Compl. at ¶ 50. Kelley-Ross further alleges that
20 Express Scripts’s position and practice is deceptive because Express Scripts unilaterally
21 drafted the parties’ contract which “clearly sets forth reimbursement rates for generic
22 specialty medications and [Express Scripts] maintains its ability to update it at any time,
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1 but [Express Scripts] takes the position that such rates are inapplicable to any generic
2 medication that a pharmacy would actually dispense under Schedule S.” Compl. at ¶ 51.

3 Kelley-Ross has not sufficiently pleaded the first element. “Only acts that have
4 the capacity to deceive *a substantial portion* of the public are actionable.” Goodyear Tire
5 & Rubber Co. v. Whiteman Tire, Inc., 86 Wn. App. 732, 744, 935 P.2d 628 (1997).

6 “Typically, a breach of contract against a single person does not constitute a Consumer
7 Protection Act violation.” Teuscher v. CCB-NWB, LLC, No. 2:19-cv-0204, 2019 WL
8 5399504, at *2 (E.D. Wash. Oct. 22, 2019). With respect to the first element, Kelley-
9 Ross does not allege any conduct that was directed at the public. Express Scripts’s
10 dealings with pharmacies and the contractual terms it agrees to in those relationships do
11 not have deceptive capacity affecting the public in general. See Goodyear Tire & Rubber
12 Co., 86 Wn. App. at 744; see also Segal Co. (E. States), Inc. v. Amazon.Com, 280 F.
13 Supp. 2d 1229, 1233 (2003) (“[T]he fact that defendant may have engaged in additional
14 commercial dealings does not indicate that its activities have the potential to deceive a
15 ‘substantial portion’ of the public.”). For this reason, Kelley-Ross fails to allege the first
16 element of its CPA claim.

17 **b. Affecting the Public Interest**

18 The Court also concludes that Kelley-Ross fails to allege the third element of its
19 CPA claim. The public interest element requires that there be a likelihood additional
20 persons have been or will be injured in the same fashion. Goodyear Tire & Rubber Co.,
21 86 Wn. App. at 744–45. “Ordinarily, a breach of a private contract affecting no one but
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1 the parties to the contract is not an act or practice affecting the public interest.” Hangman
2 Ridge Training Stables, Inc., 105 Wn.2d at 790.

3 Kelley-Ross alleges that its contract dispute with Express Scripts affects the public
4 interest by limiting access to medication in vulnerable communities:

5 [Express Scripts’s] position and practice with respect to generic specialty
6 medications is also detrimental to the public. The ability of pharmacies to
7 continue dispensing generic specialty medications like the life-saving PrEP
8 drug ETDF/Truvada, while also ensuring that patients taking that medication
9 are provided adequate instruction and monitoring, is of critical importance to
10 vulnerable communities and to the LGBTQIA+ community broadly, which
has disproportionately suffered the impacts of HIV/AIDS. [Express
Scripts’s] position and practice places those communities’ access to
important medications in jeopardy. This practice could also force patients to
be steered to [Express Scripts]-owned pharmacies for any potential cost
savings, removing local access to care in a highly vulnerable population.

11 Compl. at ¶ 52. This allegation, however, does not allege that other people will be
12 harmed *in the same fashion* as Kelley-Ross. A lack of access to medication in vulnerable
13 communities is a distinctly different injury than what Kelley-Ross has allegedly
14 suffered—namely being under-reimbursed for medication. Since Kelley-Ross does not
15 allege that other people will likely be injured in the same way that it has been, it has not
16 adequately alleged the third element.

17 For a CPA claim, all elements must be present and a finding that any element is
18 missing is fatal to the claim. Goodyear Tire & Rubber Co., 86 Wn. App. at 743. Because
19 Kelley-Ross does not sufficiently allege the first or third elements of its CPA claim, that
20 claim is DISMISSED without prejudice and with leave to amend.

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1 **Conclusion**

2 For the foregoing reasons, the Court ORDERS:

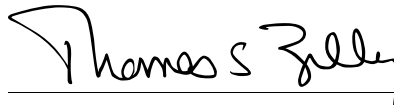
3 (1) The Motion to Dismiss, docket no. 17, is GRANTED in part and DENIED
4 in part. The claims for breach of the covenant of good faith and fair dealing and for
5 violation of the CPA are DISMISSED without prejudice and with leave to amend. The
6 motion is otherwise DENIED.

7 (2) Any amended complaint shall be filed within thirty (30) days of the date of
8 this Order.

9 (3) The Clerk is directed to send a copy of this Order to all counsel of record.

10 IT IS SO ORDERED.

11 Dated this 3rd day of June, 2022.

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14 Thomas S. Zilly
15 United States District Judge
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